STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal From the Michigan Court of Appeals)

PATRICK MANN, SR., GAYE MANN, his wife, and PATRICK MANN, JR., a minor, by and through his Next Friend, GAYE MANN,

Plaintiffs-Appellees,

vs.

ST. CLAIR COUNTY ROAD COMMISSION,

Defendant-Appellant.

Supreme Court No. 122845

Court of Appeals No. 226443
(Judges Harold Hood, Murphy, Markey)

St. Clair County Circuit No. 98-001686-NI
Hon. Peter E. Deegan

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PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

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DOES THE FIVE PERCENT STATUTORY CAP ON THE REDUCTION OF DAMAGES FOR FAILURE TO WEAR SEAT BELTS, MCLA 257.710e(6), APPLY TO THIS ROAD DEFECT CASE UNDER MCLA 691.1402?

Plaintiffs, the Circuit Court and the Court of Appeals answer, "**YES**".

Defendant says, "**NO**".

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This is a highway defect case against Defendant, St. Clair County Road Commission. See, MCLA 691.1402. The Plaintiffs include Patrick Mann; his wife, Gaye Mann; and Gaye Mann as Next Friend on behalf of minor child, Patrick Mann, Jr. (Appx. p. 2a).[1]

The "Facts and Procedural History", to the extent necessary for the Court's resolution of the purely legal issue presented by Defendant's appeal, are recited accurately by the Court of Appeals as follows (Appx. 12a):

> "Plaintiffs allege that Patrick Mann, Sr., and Patrick Mann, Jr., suffered various injuries after their vehicle 'slipped' off the edge of the roadway and onto the shoulder. Plaintiffs represent that Mann, Sr., had difficulty returning the vehicle to the roadway because of a 'significant shoulder drop-off.' As a consequence, Mann, Sr., lost control of the vehicle and eventually collided with a tree on the side of the roadway. Thereafter, plaintiffs filed an action against defendant claiming a defective roadway. Plaintiffs alleged in part that defendant's negligent maintenance of the shoulder of the roadway proximately caused plaintiffs' injuries.
>
> "Defendant filed an affirmative defense alleging plaintiffs' comparative negligence for their failure to wear safety belts. [Plaintiff, Patrick Mann, Sr., testified in his deposition that he and his son were wearing safety belts.] Defendant moved in limine for a ruling that the statutory provision, MCL 257.710e(6), does not apply in this road liability case. The circuit court disagreed, ruling that the statutory cap of five percent applies and declining to extend the rationale of Klinke[v Mitsubishi Motors Corp., 458 Mich 582 (1998)]. Defendant's interlocutory application for leave to appeal was granted, and the circuit court has stayed trial pending a decision from this Court."

254 Mich App 86, 88-89.

On February 22, 2000, the Circuit Judge heard argument on various motions in limine, including Defendant's motion to place this case outside the five percent cap on reduction of damages for failure to wear seat belts under MCLA 257.710e(6); citing, Klinke v Mitsubishi Motors Corp., 458 Mich 582, in which this Court held the cap inapplicable to product liability

[1] The references are to Appellant's Appendix.

cases, though not reaching a majority rationale for that result (Appx. pp. 32a-35a; 38a-46a; TR. 2/22/00). The Circuit Judge denied the motion, stating:

> "The Defendant is asking this Court to apply the rationale of Klinke to the present facts and find the statutory cap is not concerned with the civil liability of the Road Commission because liability did not arise from the operation of a motor vehicle under its control.
>
> "We're not able to find any cases in Michigan directly on point in relationship to this matter. All we have is what the Supreme Court did in Klinke specifically as it related to the products liability-type of a situation. Whether or not the Court's going to expand that beyond that or not to other type of situations, I'm not clear at this point. And I'm not going to venture out on my own and do it. I'm going to have to leave that -- as I look at the State of the law here in Michigan, I think Klinke is the law as it relates to products liability and as it applies to a situation that takes it out, but it's limited at this time in history to that, and until we hear further from the Supreme Court, we're still obligated to function under statutory cap and so, therefore, I decline to grant the Motion in Limine."

(Appx. pp. 45a-46a; TR., 2/22/00, pp. 24-25).

From the Circuit Court's March 22, 2000 Order Denying Defendant's Motion in Limine (Appx. pp. 9a-10a), Defendant appealed by leave granted May 18, 2000.

The Court of Appeals, Judge Markey dissenting, affirmed by published opinion of November 15, 2002 (No. 226443; Appx. pp. 11a-24a). 254 Mich App 86.

This Court granted leave to appeal on July 3, 2003. 468 Mich 942.

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ARGUMENT

A. COUNTER-STATEMENT OF STANDARD OF REVIEW

Since Defendant's appeal presents a question of law, Plaintiff concurs in Appellant's Statement of the Standard of Review (de novo).

B. THE FIVE PERCENT STATUTORY CAP ON REDUCTION OF DAMAGES FOR FAILURE TO WEAR A SEAT BELT, MCLA 257.710e(6), APPLIES TO THIS ROAD DEFECT CASE UNDER MCLA 691.1402

Under MCLA 257.710e(6):

> Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, such negligence shall not reduce the recovery for damages by more than 5%. [emphasis added].

Plaintiffs respectfully submit that the plain and unambiguous language of this statute renders the five percent limit on comparative negligence for non-use of seatbelts applicable to this highway defect case. Plaintiffs' "damages" arise from their "operation of a motor vehicle" on a defective highway. MCLA 257.710e(6). This Court should apply the "plain and ordinary meaning" of this statute, and "may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature" to extend the five percent comparative negligence limitation to any case in which the Plaintiffs' "damages" (as opposed to the Defendant's liability) arises from the ownership, maintenance, or operation of a motor vehicle. Pohutski v City of Allen Park, 465 Mich 675, 683 (2002).

Defendant nevertheless contends that this statute, limiting the comparative negligence finding to five percent, does not apply to this road defect case, citing Klinke v Mitsubishi Motors

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Corp., 458 Mich 582 (1998), which held, without a majority rationale, that the statute does not apply to product liability cases.

First of all, Plaintiffs respectfully incorporate by reference the analysis of the Court of Appeals' majority (Apppx. Pp. 11a-21a). 254 Mich App 86-105. There is no need to repeat that here.

Secondly, the basic flaw in Defendant's argument is that it fails to appreciate the distinction between the theory of recovery in auto accident-related cases other than automobile negligence (i.e., negligent driving) cases and the source of the "damages", for purposes of MCLA 257.710e(6), supra. The statute does not require that the Defendant's "liability" arise "out of the ownership, maintenance, or operation of a motor vehicle," but rather, that the "damages" so arise. The statute's focus is upon the source of the Plaintiffs' damages, not upon the fault-carrying actions of the Defendant. The motor vehicle "operation" which the statute refers to is operation of the vehicle in which the Plaintiff was injured, not such operation by the Defendant. As the Missouri Supreme Court stated, in rejecting a similar argument (albeit in a product case) with respect to a comparative negligence-limiting statute, in Newman v Ford Motor Co., 975 SW2d 147, 155 (1998) (*en banc*):

> "While Ford is certainly correct that 'operation' is not design, this argument ultimately fails, since it assumes it conclusion -- that the 'operation' referred to is that of the defendant and not of the plaintiff. The section refers only to damages arising out of the operation of a motor vehicle; it does not specify by whom, nor must it in order to make sense. Under the most plain reading of the statute, contributory negligence on the part of a plaintiff for not wearing a seatbelt is disallowed in any action for damages arising out of operation of a motor vehicle, whether or not the defendant was the one operating the vehicle."

Furthermore, MCLA 257.710e(6) is a sub-section of a section of the Motor Vehicle Code which requires all drivers and front seat passengers to "wear a properly-adjusted and fastened

safety belt," with certain inapplicable exceptions. MCLA 257.710e(3). All such drivers are supposed to wear safety belts, not just those who happen to be automobile negligence plaintiffs.

Defendant wishes to extend this Court's ruling in Klinke to this particular case, involving a road defect claim under MCLA 691.1402. Klinke provides no support for such an extension.

"Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of stare decisis." People v Gahan, 456 Mich 264, 274 (1997); quoting, Negri v Slotkin, 397 Mich 105, 109 (1976). Klinke is not controlling precedent, because it contains no majority rationale.

Writing for three justices, Justice Boyle in her concurring opinion in Klinke concluded that the five percent cap only applies to cases arising under the No-Fault Act, i.e., automobile negligence cases. Klinke, 458 Mich 582, 593.

On the other hand, Justice Weaver, writing for herself and one other justice (Justice Taylor) concluded that the five percent cap does not apply to product liability cases, referring to the Motor Vehicle Code's title language as support for her analysis. 458 Mich 582, 589. Justice Weaver noted that the Motor Vehicle Code provides for civil liability of owners and operators of motor vehicles, and "nowhere" for "the manufacture of motor vehicles or ... the civil liability of manufacturers." Id., 589.

There is no majority rationale in Klinke which might extend the non-application of the five percent cap to any cases other than product liability cases, much less specifically to road defect actions. Indeed, applying the rationale of Justices Weaver and Taylor, that is, reference to the Motor Vehicle Code's title, one finds support for application of the five percent cap to cases brought under MCLA 691.1402, supra. The title to the Motor Vehicle Code shows various purposes, not only "to provide for civil liability of owners and operators of vehicles," but also "to

provide for the regulation and use of streets and highways ..." 1949 PA 300; Michigan Compiled Laws Annotated, §§ 256.1, et. seq., 1999 Supplement, at p. 17 (emphasis added). Thus, this highway defect case does have a direct, subject matter connection to the regulatory scope of the Motor Vehicle Code, unlike product liability actions, which lack such a connection, as noted by Justice Weaver in her lead opinion in Klinke.

Application of the five percent cap to road defect cases comports with the language of the Governmental Tort Liability Act as well. Under MCLA 691.1402(1), governmental agencies having jurisdiction over a highway "shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel" (emphasis added). Persons, such as these Plaintiffs, "sustaining bodily injury or damage ... by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency." Id. This is a statute which is meant to protect those engaged in the act of driving, quite obviously. Indeed, this Court has held that the highway defect statute creates a duty which is limited exclusively to dangerous or defective conditions within the roadway, designed for vehicular travel. Nawrocki v Macomb County Road Commission, 463 Mich 143 (2000). Highway defect cases thus, of necessity, involve injuries which arise from the operation of motor vehicles. It only makes sense to apply the five percent cap to this particular type of case, which does not involve activity (such as product manufacture) taking place well away from the point of travel. In this type of case, the Plaintiffs' damages can only "aris[e] out of the ownership, maintenance, or operation of a motor vehicle," within the meaning of MCLA 257.710e(6), supra. The clear and unambiguous language of the statute itself sustains Plaintiff's argument, rendering further judicial construction unnecessary "and therefore, precluded." Lorencz v Ford Motor Co., 439 Mich 370, 376-377 (1992).

Other jurisdictions have even expressed different views on whether the phrase, "arising out of the operation or use of a motor vehicle" applies to product liability actions. Hodges v Ford Motor Co., 21 Cal 4th 109; 980 P2d 433 (1999); Newman v Ford Motor Co., supra, 975 SW2d 147, 154-155. This is not a product liability case. To extend this Court's decision (there being no binding rationale in that set of opinions) to a motor vehicle accident not involving a product liability claim, but rather, a road defect claim, is not a result required by Klinke, and would be, in fact, inconsistent with the analysis employed by Justice Weaver in her lead opinion therein. The accident giving rise to this litigation arose from the "ownership, maintenance, or operation of a motor vehicle." MCLA 257.710e(6).

C. DEFENDANT'S TITLE-OBJECT CLAUSE ARGUMENT LACKS MERIT

The Court of Appeals correctly concluded that application of MCLA 257.710e(6) to highway defect cases under MCLA 691.1402 would not violate the Title-Object Clause of the Michigan Constitution, Article IV, § 24. The latter provision is as follows:

> "No law shall embrace more than one object, which shall be expressed in its title."

As this Court noted in Pohutski, supra, Article IV, § 24 "requires that (1) a law must not embrace more than one object, and (2) the object of the law must be expressed in its title. Livonia v Dept. of Social Services, 423 Mich 466, 496 [1985]." 465 Mich 675, 691. "The goal of the clause is notice, not restriction of legislation." Id. Hence, a statute does not run afoul of Article IV, § 24 unless it includes a subject "that has no necessary connection to the primary object of the Act," it being sufficient that the object in question be "germane, auxiliary, and incidental to the general purpose of the Act." Id., 693.

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The Motor Vehicle Code's title includes, among the objects set forth therein, "regulation of certain vehicles operated upon the public highways of this state"; "the regulation and use of streets and highways;" and, among other objects, the provision "for civil liabilities of owners and operators of vehicles ..." 1949 PA 300; MCLA 256.1. Highway defect cases, under MCLA 691.1402, have a direct, subject matter connection to the regulatory scope of the Motor Vehicle Code, unlike product liability actions, which lack such a connection, as noted by Justice Weaver in her lead opinion in Klinke. The Code's regulatory concerns are legitimately germane to the five percent seatbelt use/comparative fault provision. MCLA 257.710e(6). As the Court of Appeals noted, "there is a natural correlation or connection between governmental liability for failing to maintain a highway in reasonable repair and the Michigan Vehicle Code, which governs the operation of vehicles on those same public highways." 254 Mich App 86, 99 (Appx. p. 18a).

It is not necessary for the Legislature to attain its object (mandated seatbelt use) that the Legislature mention every sort of case in which the five percent limitation would apply, specifically. Given the natural, subject matter connection between the two laws, MCLA 691.1402 and the Vehicle Code, there is no violation of Article IV, § 24.

In fact, this Court has repeatedly concluded that the Vehicle Code's title is broad enough to include various subject matters, so long as they relate in more than a tangential fashion to the subject matter of driver safety and financial responsibility. Surtman v Secretary of State, 309 Mich 270, 277-278 (1944) (provision requiring report of involvement in an automobile accident to the Secretary of State); Jacobson v Carlson, 302 Mich 448, 453-454 (1942) (regulation of pedestrian traffic). Like those enactments, MCLA 257.710e(6) is aimed at increasing "the safety

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of the highways," which is enough for the legislation to survive Defendant's Title-Object challenge. Jacobson, at 453.

D. DEFENDANT'S RELIANCE UPON THE COMPARATIVE FAULT "TORT REFORMS" LACKS MERIT

Finally, Defendant, in its Arguments "D" and "E", suggests that even if MCLA 257.710e(6), supra, applies to highway defect litigation, that same statute has been repealed by subsequent "tort reforms" which mandate consideration of comparative fault. Citing, MCLA 600.2957, 2959 and 6304.

First of all, this argument violates the plain and unambiguous language of MCLA 257.710e(6), which limits comparative fault to five percent for failure to use a seatbelt in any case in which the plaintiff's damages arise from the operation of a motor vehicle. Resort to other enactments, a form of statutory construction, is precluded in these circumstances. Pohutski, 465 Mich 675, 683; citing, DiBenedetto v West Shore Hospital, 461 Mich 394, 402 (2000).

Secondly, the Legislature is presumed to have been aware of MCLA 257.710e(6) when it enacted the subsequent, "comparative fault" statutes. Nummer v Dept. of Treasury, 448 Mich 534, 553, fn. 23 (1995); quoting, Lenawee County Gas & Electric Co. v City of Adrian, 209 Mich 52, 64 (1920). If the Legislature wished to repeal MCLA 257.710e(6), it would have said so. Repeals by implication are disfavored. Donajkowski v Alpena Power Co., 460 Mich 243, 253 (1999).

Finally, and just as importantly, where two statutes conflict, the more specific enactment governs "over the more general provision." Frame v Nehls, 452 Mich 171, 176, fn. 3 (1996). It is obviously true that MCLA 257.710e(6), supra, with its focus upon the specific omission to wear a seatbelt as the basis for comparative fault, is much more specific than the general, comparative fault "reforms" which Defendant refers to in these subsections of Defendant's Brief.

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Accordingly, even if the Court were to imagine that a conflict exists, it would be of no aid to Defendant's presentation.

A much more sound approach to this issue, from the viewpoint of statutory construction, would be for the Court to harmonize these various statutory provisions. Lindsey v Harper Hospital, 455 Mich 56, 65 (1997). Statutes "are to be construed in *pari materia* so as to give the fullest effect to each provision." Glover v Parole Board, 460 Mich 511, 527 (1999); citing, Parks v DAIIE, 426 Mich 191, 199 (1986). It would give the fullest effect to "each provision," including MCLA 257.710e(6), to treat the latter as an exception to the comparative fault provisions which Defendant cites. "Statutes relating to the same subject but enacted at different times must be construed in *pari materia* to preserve the intent of each and to ensure that the effectiveness of one does not negate the effectiveness of the other." Calvert v Lapeer Circuit Judges, 187 Mich App 431, 435 (1991).

Note further that the "fault" which the tort reforms refer to includes only acts, omissions, or conduct which is a "proximate cause of damage sustained by a party." MCLA 600.6304(8) (quoted in Defendant's Brief at p. 15). The term "proximate cause" is a common law term with which the Legislature was presumptively familiar when it enacted MCLA 600.6304(8), supra. "Proximate cause" refers to not just cause in fact, but also whether a party "should be held legally responsible for such consequences." Skinner v Square D Co., 445 Mich 153, 164 (1994). This is a policy determination of the legal consequences of a party's conduct. Moning v Alfono, 400 Mich 425, 439 (1977). Common law words and phrases are interpreted as having the same meaning when used by the Legislature. Thomas v State Highway Dept., 398 Mich 1, 9 (1976). Except to the extent of five percent, failure to wear a safety belt is not, by virtue of MCLA

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257.710e(6), a "proximate cause" of the plaintiff's harm, within the meaning of MCLA 600.6304(8), supra.

Accordingly, Defendant's reference to the comparative fault provisions of the more recently-enacted tort "reforms" adds nothing of merit to the controversy.

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RELIEF

Plaintiffs-Appellees respectfully ask this Honorable Court to affirm the Court of Appeals' decision and judgment.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

SHARON THRASHER, being first duly sworn, deposes and says that on the 16th day of September, 2003, she served two copies each of PLAINTIFFS-APPELLEES' BRIEF ON APPEAL upon the following:

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by placing said copies in an envelope properly addressed and depositing said envelope in the U.S. mail located at Southfield, Michigan.

Further, Deponent sayeth not.

Sharon Thrasher
SHARON THRASHER

Subscribed and sworn to before me,
this 16th day of September, 2003.

Kathleen M. Robinson
NOTARY PUBLIC

KATHLEEN M. ROBINSON
Notary Public, Wayne County, Michigan
Acting in Oakland County, Michigan
My Commission Expires October 20, 2006

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